

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON NOEL PLEVINSKI,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2009

No. 281237

Wayne Circuit Court

LC No. 07-006697-01

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant pleaded guilty to receiving and concealing a stolen motor vehicle, MCL 750.535(7), and was sentenced to one to five years in prison and restitution of \$1,510. Defendant appeals by delayed leave granted the trial court's order denying his motion for an evidentiary hearing and to amend or rescind the restitution order. We affirm.

Defendant first claims that the prosecution failed to show the complainant's actual loss or that any losses resulted from defendant's conduct. Further, defendant argues that the trial court erred in finding the restitution issue waived and in denying an evidentiary hearing. In the absence of any issue of statutory interpretation, this Court reviews a restitution error for an abuse of discretion. *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007); *People v Byard*, 265 Mich App 510, 511; 696 NW2d 783 (2005). We also review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 468 Mich 247, 269; 666 NW2d 231 (2003); *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). This Court reviews a trial court's factual findings for clear error. MCR 2.613(C).

We find no abuse of discretion or reversible error here. *People v Gallagher*, 55 Mich App 613, 616, 619-621; 223 NW2d 92 (1974). Restitution is mandatory under the Crime Victim's Rights Act (CVRA), MCL 780.766(2). *Bell*, *supra* at 347. The amount of restitution ordered is to be based on "the value of the property damaged, i.e., the victim's actual loss." *In re McEvoy*, 267 Mich App 55, 78; 704 NW2d 78 (2005). The prosecution has the burden of proving the amount of loss by a preponderance of the evidence. MCL 780.767(4); *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997).

Defendant notes that the only evidence regarding the complainant's actual loss was an "Auto Repair Order" submitted by the prosecution at sentencing. This document indicated that it was an estimate and included items such as a new engine and tailgate repair that are not normally associated with car theft. The victim's statement also indicated that the owner of the vehicle suffered \$1510 in out-of-pocket expenses in damage to the vehicle as a result of the theft. Defendant, having had the opportunity to review the repair order, did not contest the amount stated therein at sentencing. Defendant first challenged the amount of restitution in a post-conviction motion. At the hearing on that motion, defendant's appellate counsel commented on the nature and extent of the repair reflected in the repair order and noted that the victim had not had the repairs performed by the entity that issued the estimate. The trial court initially appeared to agree with defendant that perhaps the restitution amount was not appropriately established. However, after the prosecutor noted that it was irrelevant whether the vehicle had yet been repaired and the defense failed to present any evidence to challenge the total indicated in the repair order, the trial court concluded that the amount of restitution ordered was not so remote that it could not have been sustained as a result of the defendant's course of conduct. The court also found the issue waived by trial counsel's failure to raise it at sentencing. The trial court thus denied defendant's motion. Having reviewed the record, we conclude that the trial court did not abuse its discretion by denying defendant's post-conviction motion to amend or rescind the restitution order or by declining to hold an evidentiary hearing. Defendant agreed to pay restitution as part of his plea, the trial court was required to order restitution by the CVRA, the prosecution presented evidence of the amount of the victim's loss, and the defendant did not challenge that amount. Therefore, we agree with the trial court that defendant waived any challenge to the amount of restitution ordered by his failure to object to the amount at sentencing. See, *People v Grant*, 455 Mich 221, 244; 565 NW2d 389 (1997). Accord, *People v Gahan*, 456 Mich 264, 276-277; 571 NW2d 503 (1997). And, although MCL 780.766(22) permits amendment of a restitution order "based upon new information related to the injury, damages, or loss for which the restitution was ordered," appellate counsel's affidavit accompanying the post-conviction motion did not contain any pertinent "new information" regarding the amount of the victim's loss sufficient to support the relief sought.

Defendant further claims that his trial attorney's failure to challenge the repair order constituted ineffective assistance of counsel. We disagree. To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was defective, and that the deficient performance was prejudicial and deprived the defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 445-446; 590 NW2d 738 (1999). To show prejudice, the defendant must show that, but for counsel's error, there is a reasonable likelihood that the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

Defendant has not presented sufficient evidence to show a serious outcome-determinative mistake by trial counsel. On the crucial issue of the amount of the victim's loss, defendant has not shown on appeal that a lower figure would likely have emerged from further investigation, research, or testimony. In exchange for his plea, defendant received dismissal of two charges and a habitual fourth offender supplement, plus a sentence bargain of one to five years and "restitution, if any." Defendant has presented no evidence or convincing argument to show that any challenge to the amount of restitution at sentencing would likely have been successful.

Thus, defendant has not shown prejudice and his claim of ineffective assistance of counsel must be rejected.

We affirm.

/s/ Michael J. Talbot  
/s/ Richard A. Bandstra  
/s/ Elizabeth L. Gleicher